In the Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U.
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MICHAEL RODAK, JR.,

No. 73-640

DWIGHT GEDULDIG,

Appellant,

v.

CAROLYN AIELLO, individually and on behalf of all others similarly situated,

Appellees.

DWIGHT GEDULDIG,

Appellant,

v.

AUGUSTINA D. ARMENDARIZ, ELIZABETH B. JOHNSON, JACQUELINE JARAMILLO, individually and on behalf of all other women similarly situated,

Appellees.

CONSOLIDATED CASES ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Brief for Appellant

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Brief for Appellant

OPINIONS BELOW

The majority and dissenting opinions of the three-judge court declaring unconstitutional the third sentence of section 2626 of the California Unemployment Insurance Code

("U.I.C." hereafter) is reported at 359 F.Supp. 792 (N.D. Cal. 1973). The majority's summary order and Judge Williams' dissenting memorandum denying appellant's motion to reconsider and set aside the judgment of the district court are unreported. They are included in the Appendix at A-54-55.

JURISDICTION

These consolidated actions were brought by Appellees on behalf of themselves and all other pregnant women similarly situated, for injunctive and declaratory relief pursuant to Title 42 United States Code section 1983, and Title 28 United States Code sections 2201 and 2202. Jurisdiction of the District Court was invoked pursuant to Title 28 United States Code sections 1343(3) and (4). Appellees sought a declaration that the third sentence of California U.I.C. section 2626, which excludes pregnancy from coverage under the state disability insurance program, is an unconstitutional denial to women of equal protection of the laws, contrary to the Fourteenth Amendment. Appellees also sought an injunction against further enforcement of the pregnancy exclusion.[1] A petition in intervention was filed by several labor organizations on behalf of their female members seeking the same substantive relief as Appellees but also asking that relief be granted, and disability benefits for pregnancy paid, retroactively to December 14, 1969. Order granting the petitioners intervenor status was entered January 30, 1973.[2]

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1. Since appellees sought an injunction against enforcement of a state statute, a three-judge court was convened under Title 28 United States Code sections 2281 and 2284.

2. The intervenors are United Automobile, Agricultural, Implement and Aerospace Workers of America (UAW); United Brotherhood of Carpenters and Joiners of America, AFL-CIO; California State Council of Carpenters; United Rubber, Cork, Linoleum and

The court heard the matter on cross motions for summary judgment and on May 31, 1973, two judges of the three-judge District Court held the pregnancy exclusion to be an unconstitutional denial of equal protection to women and enjoined appellant from further enforcing the third sentence of section 2626. The decision is silent on the question of retroactivity. Judgment was entered June 15, 1973.

Appellant filed a timely motion for reconsideration, based upon a change in state law, discussed below in more detail, which in effect narrowed the statute to exclude only maternity benefits for normal pregnancy and eliminated the exclusion for complications. The District Court, again in a two-to-one decision, denied rehearing on August 7, 1973. Appellant's Notice of Appeal to this Court was filed in the United States District Court for the Northern District of California on August 13, 1973 and is included in the appendix at A.57.

The jurisdiction of the Supreme Court of the United States to hear this direct appeal is conferred by Title 28 United States Code sections 1253 and 2101(b). *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970).

QUESTION PRESENTED

Did the district court err in holding that the State of California violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution

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Plastic Workers of America, AFL-CIO; International Ladies Garment Workers Union, AFL-CIO; Printing Specialties and Paper Products Union District Council No. 2; Social Services Employees Union, Local 535; Alameda County Central Labor Council, AFL-CIO; and Contra Costa County Labor Council, AFL-CIO, on behalf of all of the affiliated Unions of each of the above labor organizations representing the women members of said unions and on behalf of all other women similarly situated. No explanation was given by intervenors for selection of the date of December 14, 1969 in connection with retroactivity.

by denying monetary benefits to women for normal pregnancy pursuant to a state disability insurance program designed to provide benefits for illness or injury?

THE STATUTES INVOLVED

The specific statute challenged is California Unemployment Insurance Code, section 2626 (Stats. 1953, c. 308 p. 1531), which read, at the commencement of this action, as follows:

> "'Disability' or 'disabled' includes both mental or physical illness and mental or physical injury. An individual shall be deemed disabled in any day in which, because of his physical or mental conditon, he is unable to perform his regular or customary work. In no case shall the term 'disability' or 'disabled' include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter."

Effective January 1, 1974 this section has been amended and a related subsection added, as follows:

> [Section 2626]
>
> "'Disability' or 'disabled' includes both mental or physical illness, mental or physical injury, and, to the extent specified in Section 2626.2, pregnancy. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work....
>
> [Section 2626.2]
>
> "Benefits relating to pregnancy shall be paid under this part only in accordance with the following:
>
> "(a) Disability benefits shall be paid upon a doctor's certification that the claimant is disabled because of an abnormal and involuntary complication of pregnancy, including but not limited to: puerperal infec-

tion, eclampsia, caesarean section delivery, ectopic pregnancy, and toxemia.

"(b) Disability benefits shall be paid upon a doctor's certification that a condition possibly arising out of pregnancy would disable the claimant without regard to the pregnancy, including but not limited to: anemia, diabetes, embolism, heart disease, hypertension, phlebitis, phlebothrombosis, pyelonephritis thrombophlebitis, vaginitis, varicose veins, and venous thrombosis." (Stats 1973, c. 1026)

STATEMENT OF THE CASE

This is an appeal from a judgment of a three-judge district court for the Northern District of California, one judge dissenting, granting summary judgment against the State of California in consolidated actions by appellees which sought a declaration that section 2626 of the U.I.C., which does not provide benefits for pregnancy, constitutes a denial of equal protection of the laws contrary to the Fourteenth Amendment, and sought an injunction against further enforcement of that provision.[3] Appellant contended that the California code section under review represented an appropriate legislative determination by the State not to include pregnancy within a disability insurance program

3. The action on behalf of Carolyn Aiello and others was filed in the U.S. District Court for the Northern District of California on July 31, 1972. The action on behalf of Augustina Armendariz and others was commenced in the Supreme Court of the State of California on August 16, 1972, was removed to U.S. District Court on August 24, 1972, and was ordered consolidated with the Aiello case, to proceed under the Aiello title, on December 5, 1972. Appellees Aiello and Johnson suffered ectopic pregnancies; Appellee Armendariz suffered a miscarriage. All three applied for disability insurance benefits, which were initially denied but which have now been paid. Appellee Jaramillo's claim is unclear. She was eight months pregnant at the commencement of this action and had experienced no complications of pregnancy. She sought benefits for the period during which she would be incapacitated by the delivery of her child. However, she has never filed a claim for disability benefits, so far as is known to Appellant.

designed to provide benefits for illness or injury, because the condition of pregnancy is clearly distinguishable from illness or injury, and because including maternity benefits coverage within the disability insurance program would disproportionately channel the limited funds available to a small percentage of the work force and would ultimately destroy the solvency of the program as a whole. The District Court held that the failure to provide benefits for pregnancy was "not based upon a classification having a rational and substantial relationship to a legitimate state purpose" and was therefore unconstitutional.[4] The District Court also noted that "[t]he search for the purposes that actuated the legislature is a difficult one." As will be demonstrated, the exclusion of pregnancy has a very substantial relationship to a legitimate state purpose. Moreover, the history of the legislation and of the exclusion of pregnancy is very easy to find. The dissent of Judge Williams discusses the entire historical background of the disability insurance program at length.[5] The majority simply ignored it.

While this case was pending before the District Court, and unknown to the court or to the litigants, the California Court of Appeal for the Second Appellate District was considering a case entitled *Rentzer v. California Unemployment Ins. Appeals Bd.*, 32 Cal.App.3d 604 (1973) which also involved construction of section 2626 of the U.I.C. The *Rentzer* case was commenced by petition for writ of mandate in Los Angeles County Superior Court on January 19, 1972. Gail Rentzer had suffered an ectopic pregnancy which necessitated surgery to save her life. As a consequence, she was unable to work for six weeks. When the California Un-

4. 359 F. Supp. at 797.

5. 359 F. Supp. at 803-805.

employment Insurance Appeals Board denied her disability benefits for the first 28 days of her six-week disability, she petitioned the Superior Court for a writ mandating the California Unemployment Appeals Board to provide her with full disability benefits. Ms. Rentzer appealed the denial of her petition to the Court of Appeal. On May 29, 1973, the Court of Appeal rendered its opinion reversing the judgment of the Superior Court. In so doing, the Court, citing with approval an earlier California Court of Appeal decision, *Clark v. California Emp. Stab. Com.*, 166 Cal.App. 2d 326 (1958), hearing denied, construed the third sentence of section 2626 of the U.I.C. to exclude only "maternity benefits," that is, benefits for normal gestation and delivery. The California Court of Appeal decision in *Rentzer v. California Unemployment Ins. Appeals Bd.* is included in the Appendix at A .....

Following the *Rentzer decision*, the Department of Human Resources Development, on June 18, 1973, issued administrative guidelines excluding from coverage under section 2626 of the U.I.C., only "maternity benefits"—*viz.*, hospitalization and disability benefits for normal delivery and recuperation. Effective January 1, 1974, these administrative guidelines were codified as U.I.C. section 2626.2.

Based upon the substantial change in state law brought about by *Rentzer* and the ensuing revision of the state disability program, appellees Aiello, Johnson, and Armendariz have received benefits for their disabilities arising from complications of pregnancy. The only party still denied benefits is appellee Jaramilo who had a normal pregnancy and delivery. In light of this significant alteration of the issue before the court, appellant's timely motion for reconsideration should have been granted. From the Judgment and subsequent Order denying reconsideration, appellant brought this appeal.

SUMMARY OF ARGUMENT

California's decision not to provide a benefit, under its disability insurance program, for females who are absent from work due to normal pregancy and childbirth is a rational one. It is based upon important distinctions between normal pregancy and the illnesses and injuries intended to be covered by the program. It is also based upon the high frequency, long duration, and therefore very great cost, of pregancy-related absence. Because pregancy is a voluntary condition, whose very nature lends itself to planning—as well as planned use of the program—it lacks that element of the *unexpected* which is characteristic of most conditions intended to be compensated. Because a new life is involved, there are major differences between the medical treatment of pregancy and that of illness or injury. As a result, pregnancy has many more elements of difference than similarity to conditions covered by the disability insurance program.

The valid state objective of the disability insurance program, which is to cushion the blow of *unexpected* unemployment caused by non-industrial *illness* or *injury* at a *low cost* to the workers covered is completely thwarted by a requirement that normal pregnancy be compensated. The program is nondiscriminatory, both in purpose and in effect, and, as presently administered, it benefits women to a greater extent than it benefits men.

The restructuring of the disability insurance program called for by appellees and by the court below would create a program bearing little resemblance to that intended by its drafters. The cost of covering normal pregnancy is so substantial that the program could not continue in its present form and remain solvent. The State is therefore faced with a decision which will require the sacrifice of one or more of its stated objectives. The State could *significantly* increase

employee contributions; it could *substantially* reduce the level of benefits paid for illness and injury disabilities, or it could *greatly* extend the exclusionary period, in order to provide maternity benefits. None of these options is a satisfactory alternative. It is clear from the decisions of this Court that none is constitutionally required.

ARGUMENT

This case involves the California disability insurance program, under which normal pregnancy is not treated as an illness or injury. Complications of pregnancy, and worsenings of pre-existing conditions as a result of pregnancy are treated as disabilities, but the process of giving birth is treated as a normal physiological function. Appellees' challenge to this program is based upon the notion that giving birth *is* illness or injury, and that they are denied equal protection of the laws when this event is not compensated as if it were a disability.

Appellant contends that the decision below, through an inappropriate application of equal protection, has usurped the State's discretion in allocating limited insurance funds, based on the State's assessment of priorities. The practical result of the district court's decision is to legislate judicially that a State may not establish an insurance program aimed at meeting certain identifiable social welfare objectives unless it simultaneously undertakes to insure against all conditions which have any points of similarity to those covered.

There is nothing in the Fourteenth Amendment or in the decisions of this Court which mandate that a State's discretion in providing or allocating benefits is placed in such a constitutional straightjacket.

I. The Decision Not to Provide a Benefit for Female Workers Absent Due to Normal Pregnancy or Childbirth Is Supported by Legitimate State Objectives and Is Rationally Related to the Purposes of the Legislation.

A. THE PURPOSES OF THE LEGISLATION ARE READILY DISCERNIBLE.

Notwithstanding the majority's statement below that "[T]he search for the purposes that actuated the legislature [in establishing the California disability insurance program] is a difficult one," 359 F.Supp. at 797,[6] there is ample evidence of the reasons which underlie the disability insurance program and the limitation of section 2626, both in the legislative history of the provisions and in rulings of the California state courts.

Discussion of such a program began with then-Governor Earl Warren's message of January 23, 1946, to the California legislature which contained a proposal to shift a portion of the wartime surplus in the unemployment insurance fund to a disability insurance fund, utilizing the employee's 1% contribution to the unemployment insurance fund. The objective was to provide low-cost, non-job-related sickness and accident coverage out of a self-sustaining fund:

> "GENTLEMEN: In my message of January 7th I recommended that the Legislature eliminate the provisions of our Unemployment Insurance Act which now prevent compensation payments to workers *whose unemployment results from illness or injury.*
>
> • • •
>
> "[W]e have had eight years of experience and this experience demonstrates that disability compensation can be made available to workers without affecting the solvency of the fund and without the necessity for an additional contribution.

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6. It is worth noting that Judge Williams, in dissent, fully explored the legislative history which establishes the purposes and objectives of the U.I.C. and Section 2626.

• • •

"The entire financing, including administration, would be met from the present 1 per cent employee contributions, and without any new or additional contribution from employers.

• • •

"It is not possible for employees to obtain from private insurance companies protection against loss of wages or salary during sickness as adequately or cheaply as the protection could be obtained by diverting their 1% contribution for the support of a Disability Benefits Program.

• • •

"Based on Rhode Island's actual experience, *and with allowances for differences between the Rhode Island Law and the program now under consideration for California,* the cost in California would approximate $35,000,000 a year.

"This cost could be met entirely out of the 1 per cent employee contribution." California Senate Journal, January 23, 1946, 227-229. (Emphasis added.)

The Rhode Island experience to which the Governor referred is instructive. Rhode Island initially included payments for pregnancy-related work absences. However, between 1944 when the plan began and mid-1946, the Rhode Island program incurred a deficit of $1.5 million. This led to a 1946 revision in the plan which placed limits on the maximum pregnancy benefits payable. *See* "Disability Compensation for the Disabled Sick" by Nathan Sinai, published by School of Public Health, University of Michigan (1949), pp. 29-31, for a discussion of this and other factors which resulted in differences in the California plan.

The legislation enacted in response to the Governor's message has as its stated purpose "to compensate in part for the wage loss sustained by individuals unemployed

because of sickness or injury. . . ."[7] The section defining disability is also couched in terms of "mental or physical *illness*" and "mental or physical *injury*."[8] (Emphasis added.)

Since their enactment, these California statutes have been interpreted by the State courts consistent with this initial purpose:

> "[T]he scope of section 2626 was considered in *Clark v. California Emp. Stab. Com.*, 166 Cal.App.2d 326 (1958), where a woman disabled from employment because of pregnancy challenged section 2626 as a denial of equal protection of the laws. In upholding the reasonableness and validity of the statutory exclusion the court said that exclusion of pregnancy-connected conditions amounted, in effect, to an exclusion of maternity benefits: '[T]o award disability compensation to women employees on account of illness caused by pregnancy, in effect, constituted a *maternity benefit plan* for a limited group, i.e., women employees. The purpose of the unemployment disability program is to afford relief to employees sustaining loss of wages on account of illness, and not to confer *maternity benefits*. To accomplish this purpose the Legislature was entitled legally to adopt such measures as might be necessary to exclude the indirect award of *maternity benefits* as an incident to the administration of its unemployment disability program. The consequent classification adopted has a substantial relation to the legitimate object thus sought to be accomplished.' (166 Cal.App.2d at 332; italics added.)
>
> "We agree with the court's conclusion that the legislative purpose in enacting the pregnancy exclusion of section 2626 was to spare the unemployment disability program the costs of a maternity benefit plan."

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7. U.I.C. section 2601.
8. U.I.C. section 2626.

Rentzer v. California Unemployment Ins. Appeals Bd., 32 Cal.App.3d 604, 606-607 (1973).[9] The court found that Rentzer's ectopic pregnancy "was not an ordinary maternity disability involving preparation for and recuperation from normal gestation and delivery," and held her condition compensable precisely because it was not a normal pregnancy. *Rentzer*, 32 Cal.App.3d at 607.

As this history illustrates, there were several key objectives and purposes which led to the establishment of the U.I.C. *and* the exclusion of benefits for pregnancy and childbirth:

1. To provide partial income replacement during the interim period workers are forced to be absent from work due to illness or injury;

2. To create a self-sustaining fund which would not draw upon other state resources;

3. To retain a maximum 1% employee contribution which would afford less expensive protection than private insurance programs;[10] and

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9. Although *Rentzer* was not brought to the lower court's attention until appellant's Motion for Reconsideration (Jurisdictional Statement, Appendix E), *Clark* was cited by Judge Williams in dissent.

Authoritative constructions of the purposes and objectives of state law are binding in federal court review of the legislation. See *Eisenstadt v. Baird*, 405 U.S. 438, 442 (1972); *Groppi v. Wisconsin*, 400 U.S. 505, 507 (1971).

10. Further support for the legislative intent to keep employee contributions at the minimal rate of 1% can be found in U.I.C. section 2604, which gives the agency director emergency powers to forestall insolvency by decreasing benefits or lengthening the waiting time for eligibility, *but not by increasing the rate of contribution*.

Subsequent legislation reaffirms the State's determination to retain solvency within the limits established. As part of a bill containing an urgency clause describing the need to increase cash inflow of funds the legislature authorized a significant increase in wages subject to withholding, and a closer tie-in between amount of benefits collectible and amount of contributions made. These fea-

4. Not to establish an incidental, yet fiscally prohibitive, maternity benefit plan.

Because pregnancy-related absences are not physiologically comparable to illness or injury, and because their inclusion necessarily would have exceeded the resources of the fund, they were excluded.

B. THE STATE OBJECTIVES ARE VALID AND LEGITIMATE.

There is no constitutional requirement that governments establish comprehensive public welfare assistance programs,[11] subsidized housing programs,[12] social security and workmen's compensation plans, or unemployment compensation programs.[13] All that is required is that such programs as are adopted "be rationally based and free from invidious discrimination." *Dandridge v. Williams*, 397 U.S. 471, 487 (1970). Stated another way, to pass equal protection muster, a State must demonstrate that its "statutory classification bear[s] some rational relationship to a legitimate state purpose." *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972).

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tures along with certain technical adjustments were intended to be permanent. One expressly temporary change was:

> "The contribution rate shall be 1.1 percent with respect to the wages paid after July 31, 1965 and prior to January 1, 1966.
>
> "The contribution rate shall be 1 percent with respect to the wages paid after December 31, 1965."

The approach suggested by the majority below of increasing the limit on wages subject to withholding would not provide a solution to the cost of covering pregnancy. Even if the wage ceiling were entirely eliminated, it would not generate sufficient income to cover payments for normal pregnancy and childbirth.

11. *Cf. Jefferson v. Hackney*, 406 U.S. 535 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970).

12. *Cf. James v. Valtierra*, 402 U.S. 137 (1971).

13. *Cf. Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Richardson v. Belcher*, 404 U.S. 78 (1971).

Within this framework, statutory provisions which attempt to distribute social or economic benefits, even when the benefits involve such basic and important rights as education, *San Antonio Independent School District v. Rodriguez*, ... U.S. ....., 93 S.Ct. 1278, 1997 (1973), or minimum levels of economic subsistence, *Dandridge*, 397 U.S. at 485, need not be the most complete that could be devised. *Rodriguez, Jefferson, Dandridge, supra*. So long as the State's system does not irrationally ignore the basic purposes of the legislation in allocating benefits, this Court has recognized "more than one constitutionally permissible method of solving" the problem at hand. *Rodriguez*, 93 S.Ct. at 1301.

Reviewing the four primary purposes and objectives of the U.I.C. set forth above,[14] the State of California can demonstrate that each is a legitimate state concern. The first three are, collectively, the fiscal objectives of the program: they reflect a concern to compensate workers during periods when their employment is temporarily interrupted by illness or injury and an overriding concern that employee contributions be limited to a 1% maximum, without resort to other fiscal resources. The fourth represents a legislative policy decision not to establish a maternity benefit plan for women who leave work for reasons of normal pregnancy and childbirth, based in part on the experience of Rhode Island.[15]

This Court, and the majority below,[16] have indicated that the fiscal concerns demonstrated here are clearly legitimate interests which a state may protect. *E.g., United States v. Kras*, 409 U.S. 434 (1973); *Shapiro v. Thompson*, 394 U.S.

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14. *Supra*, at 13-14.

15. *See* discussion *supra* at 11.

16. 359 F. Supp. at 798.

618 (1969). The objective of providing income supplementation for ill and injured workers is clearly a legitimate state objective. *Cf. Weber v. Aetna Casualty & Surety Co., supra, Richardson v. Belcher,* 404 U.S. 78 (1971). The failure to establish a companion maternity benefit program in itself is not constitutionally proscribed. *Cf. Rodriguez, Jefferson, Dandridge, supra.*

The majority below found that the failure to include benefits for normal pregnancy and childbirth in the California U.I.C. program lacked any "rational and substantial relationship to the legitimate state purpose." 359 F.Supp. at 801. Appellant believes that *each* of the four purposes set forth above is manifestly aided by the exclusion of normal pregnancy from an illness and injury benefit plan. Unless each of these purposes can be characterized as beyond the constitutional bound of legitimate state interests, the opinion below must be reversed.

II. Employees Absent from Work Due to Normal Pregnancy Are Not Similarly Circumstanced to Those Absent Due to Illness or Injury.

There can be no denial of equal protection unless a State has acted differently with respect to individuals or groups "similarly circumstanced," since this Court has repeatedly held that "the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways." *Reed v. Reed,* 404 U.S. 71, 75-76 (1971). There are demonstrable differences between normal pregnancy and the illnesses and injuries with which the U.I.C. is concerned. There are also differences between the absence from work resulting from pregnancy and that caused by illness or injury, in terms of severity, duration, and frequency of non-return to work which are relevant to the purposes of the program.

In failing to recognize the practical differences between pregnancy and illness and injury disabilities, the judgment of the Court below was no doubt influenced by the fact that, at the time of its decision, the disability insurance program excluded abnormal and complicated pregnancies from coverage as well. Three of the four plaintiffs in the case had suffered extreme complications "resulting in dramatic objective, medically verifiable disabilities." 359 F.Supp. at 801. The court specifically relied on the facts of these extraordinary pregnancy claims in rejecting the State's justifications for the U.I.C.'s treatment of pregnancy generally. Based on a change in State law,[17] appellant sought reconsideration by the district court of the much narrower question whether the State could lawfully exclude benefits for *normal pregnancy* from the disability insurance program. By denying appellant's motion, the district court in effect concluded that even normal pregnancy is indistinguishable from illness and injury for purposes of the U.I.C.[18] The discussion which follows demonstrates that this conclusion is unfounded.

A. PREGNANCY IS NEITHER ILLNESS NOR INJURY BUT RATHER A NORMAL BIOLOGICAL FUNCTION.

Settled actuarial, medical and sociological authority demonstrates the dissimilarity of the nature and consequences of pregnancy from the illness and injury disabilities covered by the U.I.C.[19] The record before this Court in its

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17. *See* discussion of *Rentzer, supra* at 6-7.

18. See dissent of Williams, J., from the order of the district court denying rehearing. A.56.

19. The affidavit of appellee Elizabeth B. Johnson accepts the distinction between a normal and a complicated pregnancy. She states: "I do not understand why this debilitating illness (ectopic pregnancy) was treated and penalized by Human Resources Development Department *just as if it were a normal, consciously chosen, healthy and successful pregnancy.*" (A.18) (Emphasis added.)

recent decision in *Cleveland Board of Education v. La Fleur*,[20] demonstrates the unique nature of pregnancy. One eminent specialist testified:

> Q. Is pregnancy a sickness or injury?
>
> A. No.
>
> Q. Could you give a medical definition of what pregnancy is in physical relationship?
>
> A. It is a normal biologic function. It should not be regarded as illness anymore than menstrual periods are regarded as an illness. An illness is when [a] bodily function is deranged, there is [a] malfunction of symptoms and pregnancy is, of course a normal biologic phenomena.[21]

The concurring opinion of Justice Powell recognizes that: "pregnancy is a normal biological function."[22] In "The Sick Role—Illness and Pregnancy," 6 Social Science and Medicine 561 (1972), at 568-571, the author, John B. McKinlay, Associate Professor of Sociology at Boston University, explains that pregnancy does not mesh with the concept of the "sick role," for these reasons:

> 1. It is considered statistically normal, in that most of the possible conceivers do conceive at some time. Cancer, coronary thrombosis and pneumonia are not, in this sense, normal "facts of life" or "natural vicissitudes."

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20. No. 72-777 decided together with *Cohen v. Chesterfield County School Board*, No. 72-1129, January 21, 1974 (hereinafter cited as *La Fleur*).

21. Testimony of Dr. Leo J. Dunn, Professor and Chairman of Obstetrics and Gynecology, Medical College of Virginia, quoted in respondent's brief to Supreme Court, pp. 12-13, in *Cohen v. Chesterfield, supra*.

22. *La Fleur, supra* (Powell, J., concurring), slip opinion at 2. The opinion further recognizes that: "Teachers who undergo abnormal pregnancies may well be disabled, either temporarily or for a substantial period. But as I read the Court, boards may deal with abnormal pregnancies like any other disability. *Ante*, at 9 n. 10." *Id.* at 5 n. 3.

2. Pregnancy is a normal biological function necessary for survival of the species. Sickness jeopardizes survival.

3. Pregnancy is normal because usually desirable. One often congratulates a woman who is pregnant, while those with sicknesses are not congratulated but are treated as abnormal and stigma often attaches.

4. A pregnant woman need not be motivated to "get well." The factor of motivation to recover is often crucial in restoration of health in real sickness cases.

The factual difference between normal pregnancy and disability arising from illness or injury demonstrates that women experiencing a normal pregnancy are not "similarly circumstanced" when compared to men *and women* who are disabled for other physical or mental reasons.

B. ABSENCES FROM WORK IN CONNECTION WITH PREGNANCY AND CHILDBIRTH ARE DISSIMILAR TO THOSE CAUSED BY ILLNESS AND INJURY.

Absences from work which result from normal pregnancy and childbirth are significantly different from those which result from illness and injury in ways which are relevant to the objectives of the disability insurance program. Pregnancy is, to a much greater extent than any illness or injury, voluntary and subject to planning.[23] Included in that planning, as noted by the dissenting opinion of Judge Williams, is the possibility of planned use of the disability insurance program:

> "In order for a worker to collect maximum benefits of $105 per week for 26 weeks, it is only necessary to earn $8,500 per year and have 1% of that sum, or $85.00 per year withheld as a disability insurance contribution.

23. *See Roe v. Wade*, 410 U.S. 113 (1973). Even where pregnancy is unexpected, the period of actual inability to work can be anticipated months in advance, and the attendant expenses calculated and met in other ways.

> If pregnancy were covered, a woman not ordinarily pursuing a career, could go to work for one year, and would then be eligible to collect $2,730 in pregnancy benefits if her doctor will certify that she is temporarily disabled from working the full 26-week period." 359 F. Supp. at 806.

Judge Williams' observations suggest another difference between pregnancy and disabilities due to illness or injury. Pregnancy generally prompts a request for leave which is substantially longer than any actual inability to work. While it is possible to distinguish between maternity leave and the shorter period of time a female employee is actually unable to work because of childbirth, in practice disability claims tend to be made for the traditional maternity leave period. The claims for disability payments received by the State since the decision below average 103 days, or approximately 15 weeks.[24] It can also be expected that maternity leaves will be requested based on concern for the welfare of the child, in addition to any disability on the part of the employee.[25]

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24. See affidavit of Joanne Condas. A.59. It should be noted that these claims, which have been certified by physicians, evidence a most liberal attitude on the part of the medical profession toward pregnancy-related disabilities.

25. The record contains a claim received by appellant involving a doctor's certification that the unborn child's health—not the mother's—would be endangered by her continued working in a chemical plant. A.61.

After delivery, concern for the child may continue to affect the mother's activities:

> "While pregnancy and postpartum care are states of health and not illness, a little conservative management does not hurt. Rest will determine the milk production in a nursing mother and will, therefore, determine how satisfied the baby's needs are. Try to take a nap each day." S. Cherry, Understanding Pregnancy & Childbirth (1973) at 137.

See also the affidavit of obstetrician Dr. Philip Goldstein submitted by appellees, which acknowledges the modern trend in medicine to treat the family unit. (A.38).

Moreover, pregnancy often results in a resignation from employment. Unlike illness or injury, pregnancy and childbirth are often viewed by women employees as a logical point at which to terminate their jobs. The experience of private disability insurance plans is that 50% of women who take leave from employment for childbearing do not return to work. In comparison, the non-return rate of those who recover from an illness or injury may be less than 1%.[26] If these statistics are valid for the California work force, about half of the benefits paid for normal pregnancy would not carry out the basic objective of the U.I.C.—to provide a bridge between periods of gainful employment—and would constitute "severance" pay or "early retirement."[27]

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26. Testimony of Paul Jackson, actuary for The Wyatt Co., expert witness for defendants in the trial of *Gilbert v. General Electric Co.*, No. 142-72-R (E.D. Va., July 25, 1973). Approximately the same percentage was disclosed by a survey of sickness and accident disability leaves and maternity leaves at Illinois Bell Tel. Co., Brief of American Telephone and Telegraph Co., amicus curiae herein.

27. The federal agencies charged with elimination of sex discrimination in compensation have recognized the unique nature of pregnancy-related absences for employment purposes. The Wage and Hour Administrator has determined that "payments related to maternity" are not wages to be compared for purposes of the Equal Pay Act [29 U.S.C. § 206(d)]. 29 C.F.R. § 800.110. This interpretation is currently followed by the Office of Federal Contract Compliance for purposes of Executive Order 11246, as amended. Thus, while federal contractors must provide reasonable leave for childbearing, "There is no requirement that an employee be paid during the absence." Memorandum of John L. Wilkes, Director, OFCC, to Agency Heads (Nov. 12, 1970) at 5. But *see* 38 Fed. Reg. 35336-35338, Dec. 27, 1973. While the Equal Employment Opportunity Commission currently takes a contrary position in construing Title VII of the Civil Rights Act [42 U.S.C. §§ 2000e *et seq.*], it initially and repeatedly held that pregnancy need not be covered under a sickness and accident disability plan. *See, e.g.*, Gen. Coun. Opinion Letter, Nov. 10, 1966, CCH Empl. Prac. Guide ¶ 17,304.49 (1966); Case No. LA-68-4-538E, CCH EEOC Dec. ¶ 6125 (June 16, 1969); Decision No. 71-308, CCH EEOC Dec. ¶ 6170 (Sept. 17, 1970). It is the initial and consistent EEOC positions which are entitled to judicial deference. Udall

Recognizing pregnancy as a unique condition, this Court,[28] as well as other federal courts[29] and administrative agencies,[30] have considered questions involving the employment opportunities of pregnant employees without reference to the treatment accorded to those disabled by illness or injury.

Even the most outspoken advocates of political and economic rights of women, who have supported the proposed Equal Rights Amendment to the United States Constitution, have recognized that equality does not mean sameness.[31] For example, a memorandum of the Citizens' Advisory Council on the Status of Women, entitled "The Pro-

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v. Tallman, 280 U.S. 1 (1964). *See* Espinoza v. Farah Mfg. Co., 94 S.Ct. 334 (1973), where this Court noted a prior inconsistent EEOC position, in refusing to follow a position taken in the current EEOC Guidelines. *See* discussion in California's brief as amicus curiae in *La Fleur, supra* at 8-12.

28. The opinion of the Court in *La Fleur* nowhere compares the school board's policies regarding employees absent from work for other causes. Rather, the Court invalidated the fixed termination requirements and one of the two return policies on due process grounds.

29. Newmon v. Delta Air Lines, Inc., ... F. Supp. ..... (N.D. Ga. 1973), Daily Labor Report No. 18 at F-1 (Jan. 25, 1974). In this Title VII action the court held, consistent with this Court's recent decision in *La Fleur*, that mandatory leave policies violated the Act. However, recognizing that pregnancy is neither a sickness or a disability, it held that the employer was not required to provide disability benefits. *But see* Wetzel v. Liberty Mutual Insurance Co., Civ. No. 72-169 (W.D. Pa., Jan. 9, 1974).

30. *E.g.*, the Office of Federal Contract Compliance Sex Discrimination Guidelines requires government contractors to recognize childbearing as justification for a leave of absence for a reasonable period of time, even if the employer has no leave policy for other employees. 41 C.F.R. § 60-20.3(g)(2).

31. *See* Jefferson v. Hackney, quoted *infra* at 21. In *James v. Valtierra*, 402 U.S. 137 (1971), the Court rejected an equal protection challenge to a California requirement of referendum approval prior to the construction of low-rent housing projects in any community. The Court observed that "of course a lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection." 402 U.S. at 142.

posed Equal Rights Amendment to the United States Constitution" (1970), contains the following discussion:

> "4. *Laws Which Could Not Possibly Apply to Both Sexes Because of the Difference in Reproductive Capacity.*
>
> Laws which, as a practical matter, can apply to only one sex no matter how they are phrased, *such as laws providing maternity benefits* and laws prohibiting rape, would not be affected by the amendment. The extension of these laws to both sexes would be purely academic, since such laws would not apply differently if they were phrased in terms of both sexes. In these situations, the terminology of sex identification is of no consequence." P. 13 (emphasis added).

The legislative history of the proposed Equal Rights Amendment is consistent:

> "The legal principle underlying the Equal Rights Amendment (H.J. Res. 208) is that the law must deal with the individual attributes of the particular person and not with stereotypes of over-classification based on sex. However, the original resolution does not require that women must be treated in all respects the same as men. *Equality does not mean sameness.* As a result, the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex. For example a law providing for payment of the *medical costs of child bearing* could only apply to women. In contrast, if a particular characteristic is found among members of both sexes, then under the proposed amendment it is not the sex factor but the individual factor which should be determinative." S. Rep. No. 92-689, p. 12 (emphasis added).

The court below recognized that "Pregnancy is clearly a unique human condition. . . ."[32] 359 F. Supp. at 796. How-

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32. The court misspoke: pregnancy is a unique *female* condition.

ever, it failed to appreciate the implications of this observation for its equal protection analysis. Without "similarly circumstanced" workers who receive benefits, there is no basis for an equal protection claim.[33] The discussion above demonstrates that both pregnancy, and absences from work related to pregnancy, are significantly different from illness and injury disabilities. These differences fully justify the difference in treatment accorded by the U.I.C.

III. The U.I.C. is Nondiscriminatory in Both Purpose and Effect.

There are other fundamental defects in the conclusion of the court below that the disability insurance program denies equal protection, in addition to the absence of persons similarly circumstanced. The record contains no suggestion that the U.I.C. was drawn with the intention of discriminating against women. The absence of discriminatory purpose deprives the present case of any similarity to *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), on which the court below relied.[34] In *Shapiro* the avowed purpose of the minimum residency requirement for state public assistance was to limit interstate mobility of needy people—an object prohibited by the Constitution. However, in cases involving state welfare programs where classifications have been drawn according to rational priorities, the Court has re-

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33. *Compare* Reed v. Reed, 404 U.S. 71 (1971), where a State statute created a preference for males over females of the same degree of relationship in administering decedents' estates; Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971), a Title VII case where the employer refused to hire women but not men with small children.

34. The Court below made no effort to reconcile its reliance on *Shapiro* with footnote 10 from that case, which says: "We are not dealing here with state insurance programs which may legitimately tie the amounts of benefits to the individual's contributions" 394 U.S. at 633.

See U.I.C. section 2653 which does tie the amount of benefits payable to the amount of contributions made in the base period.

jected arguments based on statistical disparity or alleged discriminatory effect. In *Jefferson v. Hackney*, 406 U.S. 535 (1972), the Court rejected an alleged denial of equal protection based on the larger percentage of Negroes and Mexican-Americans in certain State aid categories which received a lower level of funding:

> "The acceptance of appellants' constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be. Few legislative efforts to deal with the difficult problems posed by current welfare programs could survive such scrutiny, and we do not find it required by the Fourteenth Amendment." 406 U.S. at 548-49.

The grant categories in *Jefferson* provided higher payments to the aged and infirm than to families with dependent children. The Court found this difference rational:

> "Since budgetary constraints do not allow the payment of the full standard of need for all welfare recipients, the State *may have concluded* that the aged and infirm are the least able of the categorical grant recipients to bear the hardships of an inadequate standard of living." (Emphasis added.)[35]

Certainly, then, it is reasonable for California to conclude that families, with the opportunity to anticipate and plan

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35. 406 U.S. at 549. Finding that the variation in payments to grant classifications was rationally related to a legitimate State purpose, the Court held that the "decision in Griggs v. Duke Power Co., 401 U.S. 424 (1971), is therefore inapposite. In *Griggs*, the employment tests having racially discriminatory effects were found not to be job-related, and for that reason were impermissible under the specific language of Title VII of the Civil Rights Act. Since the Texas procedure challenged here *is* related to the purpose of the welfare programs, it is not proscribed by Title VI simply because of variances in the racial composition of the different categorical programs." 406 U.S. at 550.

for the expenses of normal pregnancy, are less seriously in need of State assistance than individuals who are unexpectedly disabled by illness or injury.

Even if discriminatory effect is relevant in the present case, the undisputed facts will not permit an argument that the disability insurance program discriminates against women. As Judge Williams noted in his dissenting opinion, "Women contribute only 28% of withholdings but draw 39% of the benefit payments. Put another way, men receive $.89 per dollar contributed while women receive $1.37 per dollar contributed." 359 F.Supp. at 802 n. 1.

These figures quoted by Judge Williams were based upon data furnished by appellant from his agency's 1971 experience administering the disability insurance fund. The 1972 experience showed men receiving $.80 per dollar contributed while women received $1.27 per dollar contributed. Appellant estimates, based on claims received to date, that adding pregnancy complications would result in women receiving $1.31 per dollar contributed. If normal pregnancy is included as well, the disparity becomes truly dramatic: women would receive $2.33 per dollar contributed, compared to $.80 for men.[36] Appellant submitted other actuarial data based on his agency's experience which showed that *in every age group* the ratio of cost to contributions for female workers is significantly greater than for men.[37] This disparity is not unique to appellant's program but is a well-known and well-documented actuarial difference between the health and disability experiences of men and women. Appellant submitted data from the "Report of Mortality and Morbidity" published annually by the Society of Actuaries, which showed that both the annual claim rate and the annual claim

36. Affidavit of Carl Peterson, Exhibit D to Application for Stay.

37. Affidavit of William D. Smith, A.47.

cost are significantly greater for females than for males.[38] These facts further substantiate a legislative decision to structure the disability program in a fashion which would prevent a greater distortion in the share of benefits available to men and women.

This Court's decision in *LaFleur* recognizes the unique nature of pregnancy-related absences from work, in considering the regulation of school maternity leave policies as a question of Fourteenth Amendment due process, even though the parties and the courts below had framed the issue as one of equal protection. The Court held that the maternity leave policies of two school districts denied due process by establishing irrebuttable presumptions of disability, which encroached on constitutionally protected rights. Using an analysis very like that employed in the context of equal protection, the Court considered both the validity of the State interests asserted and their relationship to the maternity leave policies. The Court accepted the two State interests as legitimate: (1) "preserving con-

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38. Affidavit of William Smith, A.47.

See also July 13, 1973 Statement of Herbert Denenberg, Insurance Commissioner of Pennsylvania, before the Joint Economic Committee of Congress. Hearings on the Economic Problems of Women, published by The Bureau of National Affairs, Inc: "Disability coverage poses a more difficult problem as the loss experience of women, even with pregnancy costs excluded, may run two and a half times higher than for men."

The pattern of female benefits advantage, excluding benefits for normal pregnancy, is further demonstrated through data compiled by the American Telephone and Telegraph Co. In addition to showing that women lose more days to disabilities than men, these data demonstrate that in 16 of 17 categories of compensated disabilities the disability frequency rate is higher for women than men. *See* Brief of the American Telephone and Telegraph Co. as amicus curiae.

See also Brief of General Electric Company as amicus curiae, whose experience shows an average sickness and accident benefit cost for women which is twice that for men.

tinuity of instruction,"[39] and (2) "keeping physically unfit teachers out of the classroom."[40] However, it concluded that the respective policies requiring termination in the fifth and sixth month of pregnancy, as well as the policy of one district barring re-employment until the newborn child is three months old, were not rationally related to either objective.

In contrast, the U.I.C. makes no presumptions regarding pregnancy. It merely defines the scope of disability benefits consistently with its legitimate objectives. This definition is not based on unwarranted presumptions or stereotypes, but rather on the substantial differences between normal pregnancy and illness and injury disabilities discussed above.[41]

In any event, the analysis of the Court in *LaFleur* may not be relied on to support the decision below since the U.I.C. does not impinge on a constitutionally protected right. The Court in *La Fleur* was properly concerned for the substantial adverse impact the maternity policies had on the constitutionally protected right to bear children. However, the Court has recognized a fundamental distinction between governmental encroachment on private decisions involving matters of marriage and family life,[42] and the discretion of the government in determining the alloca-

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39. Slip opinion at 10.

40. *Id.* at 10-11.

41. Contrary to the presumption of the rules involved in *La Fleur*, the Court found that, "the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter." Slip opinion at 12. *Compare* Reed v. Reed, 404 U.S. at 75, where the Court recognized the immutable fact of differing longevity between the sexes.

42. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Loving v. Virginia, 338 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

tion of limited resources in economic welfare programs. In *Dandridge v. Williams, supra,* the Court rejected a claim by plaintiffs with large families that the ceiling placed by Maryland on welfare benefits violated equal protection requirements. The program was not viewed as an intrusion by the government into the protected sphere of private decision regarding procreation, even though one justification for the ceiling relied on by Maryland was "providing incentives for family planning." 397 U.S. at 484. As Justice Powell observed, concurring in *La Fleur*:

> These regulations undoubtedly add to the burdens of childbearing. But certainly not every government policy that burdens childbearing violates the Constitution. Limitations on the welfare benefits a family may receive that do not take into account the size of the family illustrate this point. *See Dandridge v. Williams,* 397 U.S. 471 (1970). Undoubtedly Congress could, as another example, constitutionally seek to discourage excessive population growth by limiting tax deductions for dependents. That would represent an intentional governmental effort to "penalize" childbearing. See *ante.* at 7. The regulations here do not have that purpose. Their deterrent impact is wholly incidental. If some intentional efforts to penalize childbearing are constitutional, and if *Dandridge, supra,* means what I think it does, then certainly these regulations are not invalid as an infringement of any right to procreate. Slip opinion at 1-2.[43]

IV. Mandating Coverage of Normal Pregnancy Would Defeat Legitimate State Objectives Embodied in the U.I.C.

As the history of the U.I.C. demonstrates, the purposes of the legislature in choosing not to include benefits for

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43. Even the question of the legality of the regulations in *La Fleur* was viewed as one of degree, with the Court expressing no view as to a narrower limitation requiring termination at a fixed date "during the last few weeks of pregnancy." Slip opinion at 14 n.13.

pregnancy have been clear from the outset. They are in not the sort of after-the-fact rationale presented to the Court in *LaFleur*.[44] As discussed more fully above, these objectives are:

1. To provide partial income replacement during the interim period workers are forced to be absent from work due to illness or injury;

2. To create a self-sustaining fund which would not draw upon other state resources;

3. To retain a maximum 1% employee contribution which would afford less expensive protection than private insurance programs; and

4. Not to establish an incidental, yet fiscally prohibitive, maternity benefit plan.

The preceding discussion has demonstrated that, in terms of the prior decisions of this Court, these objectives are undeniably legitimate; that they may appropriately be furthered by recognizing pregnancy as a condition unlike illness and injury; and that the U.I.C. is without discriminatory purpose or effect. The following discussion further demonstrates that, unlike the leave policies in *La Fleur*, the choice made by the legislature is rationally related to its legitimate objectives.

A. THE COST OF COVERING NORMAL PREGNANCY UNDER THE U.I.C. IS SUBSTANTIAL.

The current annual cost of the disability plan is approximately $362.1 million, exclusive of pregnancy. This level of benefit payments results in an almost total utilization of the 1% contribution from employees' salaries. The State introduced uncontroverted evidence in the court below indi-

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44. *See* slip opinion at 8 n. 9, and concurring opinion of Justice Powell at 3.

cating that the cost of covering pregnancy would be an additional $120.2 million, based on a thirteen-week duration.[45] The claims received by the State since the decision below have *averaged* fifteen weeks in duration and indicate that this original estimate was overly conservative. The revised estimate called for by actual experience indicates an increase in costs of $131 million, 36% over the present level of claims paid.[46] Thus with the inclusion of benefits for normal pregnancy, the total amount of claims paid would rise to $493.1 million, which is more than $100 million above the annual income of the fund.

In addition to the regular weekly benefit, the disability plan provides a hospital benefit of $12 per day.[47] Moreover, hospitalization results in a waiver of the seven-day exclusionary period. Since virtually every pregnancy in California involves hospitalization, coverage of normal pregnancy would add an average of 4 days of hospital benefits for each employee as well as an extra week of disability benefits.[48]

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45. 359 F.Supp. at 802 n.2 (Williams, J., dissenting).

46. Affidavit of Carl Peterson, Exhibit D to Application for Stay.

47. U.I.C. § 2801.

48. Obstetrical conditions account for a third of patients hospitalized in the age group 15-44, with a rate of 501.0 discharges per 10,000 population in 1971. *See* "Monthly Vital Statistics Report-Hospital Discharge Survey," U.S. Department of Health, Education and Welfare, Vol. 22, No. 6, Sept. 14, 1973, p. 3.

It should be recognized that hospitalization in the case of pregnancy, unlike confinement resulting from illness or injury, is generally prescribed for the convenience of the doctor and as a precaution against complication, particularly complications involving the newborn infant. *See* testimony of Dr. Andre Hellegers, summarized in Brief of General Electric Company, amicus curiae that "overwhelmingly" the physician is present during delivery as "a prevention of complications," rather than as a "primary requirement." Labor, he testified, "in itself does not require medical assistance . . . there is really nothing that the doctor does in labor except hold hands and rub backs and encourage, . . ."

When the U.I.C. was initially adopted, the State was well aware of these cost implications, based on the experience of the Rhode Island program. While appellees introduced no evidence on the question of cost in the court below, in their Motion to Affirm in this Court, they contend that the Rhode Island experience was based on poor control of claims.[49] There is no reason to believe California can control these claims any more effectively than did Rhode Island. As the Court recognized in *LaFleur*, medical opinion provides no reassurance:

> [*D*]*espite the plethora of conflicting medical testimony in these cases,* we can assume *arguendo* that at least some teachers become physically disabled from effectively performing their duties during the latter stages of pregnancy.[50] (Emphasis added.)

That doctors disagree sharply on the duration and severity of pregnancy disability is further confirmed in a survey conducted by Dr. Allan Treat, Medical Director of the California Department of Human Resources Development following the decision below. This survey, attached hereto as Appendix A, elicited widely divergent opinions from prominent obstetrical practitioners in California. Because of the lack of a consensus of medical opinion, appellant would find it impossible to develop a norm against which to measure claims presented. Thus, not only will pregnancy claims be the largest class of claims received, it will also include an estimate of duration which is more generous than for other disabilities and which in many cases will be based on considerations affecting infant well-being, rather than maternal disability, from which no conscientious medical practitioner can possibly divorce himself. That physi-

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49. Motion to Affirm at 15 n.13.

50. Slip opinion at 11.

cians are acutely sensitive to the welfare of both mother *and child* and can be expected to certify liberally claims of disability[51] is amply demonstrated by the claims received to date, which indicate that the State had underestimated rather than overestimated claims potential.[52] Certainly this case presents a dramatically different situation from the cases in which this Court has rejected defenses to constitutional challenges based on *speculative* cost justification.[53]

2. MODIFICATIONS OF THE PROGRAM TO PROVIDE COVERAGE OF NORMAL PREGNANCY ARE INCONSISTENT WITH LEGITIMATE STATE INTERESTS.

The court below recognized the legitimacy of the state interest in preserving "the fiscal integrity of its program," as well as its interest in making the program "self-sustaining and paid for by those who use it rather than by tax revenues drawn from the public at large." 359 F. Supp. at 798. Nonetheless, it refused to give effect to these interests, apparently because it concluded that the coverage of normal pregnancy "would not destroy the program." *Id.* The court further stated:

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51. *See, generally,* S. Cherry, Understanding Pregnancy & Childbirth (1973).

52. One proponent of mandatory disability benefits for pregnancy has estimated that such benefits would increase per-employee benefit costs by 17.6%. Remarks of J. Gutwillig, Chairperson, Citizens Advisory Council on the Status of Women, to the American Hospital Ass'n on "Job-Related Maternity Benefits" (July 27, 1972). Even this very conservative estimate, which assumes a maximum disability period of six weeks, would exceed annual U.I.C. income by over $50 million.

53. *See, e.g., Frontiero v. Richardson,* 411 U.S. 677 (1973), where the plurality opinion noted: "The Government offers no concrete evidence, however, tending to support its view that such treatment [presuming dependency of spouse of serviceman while imposing support test for servicewoman's spouse to qualify for benefits] in fact saves the Government any money."

> [T]he entire cost increase estimated by defendant could be met by requiring workers to contribute an additional amount of approximately .364 percent of their salary and increasing the maximum annual contribution to about $119. 359 F.Supp. at 798.

This observation ignores the equally important State objective of strictly limiting the amount employees will be required to contribute to support the plan. This Court has repeatedly recognized that a State has the discretion to determine the resources it will commit to social welfare programs.[54] California has exercised its discretion by fixing and maintaining the low-cost and easy-to-compute 1% rate of employee contributions. California has never seriously considered an increase in that rate, as suggested by the court.[55]

Alternatively, the court below suggested that the fiscal integrity of the fund could be protected by a general reduction in benefit levels. Thus the State would be required to reduce by 36 percent benefits generally available to men and women as protection against disabling illness and injury, in order to provide benefits for normal pregnancy. This would impose the greatest burden on those most severely disabled and most in need, in direct contradiction of the purpose of the legislation, which as Judge Williams observed, is:

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54. Clearly the adoption of any social welfare program does not result in an open-ended commitment of state funds. *See Jefferson v. Hackney, supra; Dandridge v. Williams, supra.*

55. Cal. Unemp. Ins. Code § 2604 authorizes the director of the program (with approval of the Governor) to forestall an emergency insolvency by altering the scale of benefits or increasing the waiting time for benefits. However the power to increase the contribution rate is retained exclusively by the legislature. 359 F. Supp. at 804 (Williams, J., dissenting). *See* note 3 *supra.*

"To protect against workers' loss of income by providing the broadest coverage and maximum benefits available within the limit of funds generated by a 1% contribution. . . . In each instance when the 1% contribution rate generated a surplus the legislature chose to spread it across the entire work force (including women in plaintiffs' claimed class) in the form of increased benefits rather than for financing the removal of the limitations on liability here under attack." 359 F. Supp. at 803-805.

This court has held that a State may lawfully prefer the aged and the infirm to families with dependent children in the benefit scheme of welfare legislation.[56] Surely then the State is competent to determine that limited funds derived from all workers should be used to provide broad protection to all workers, male and female, against *illness* and *injury* disabilities, rather than to provide maternity benefits for normal pregnancy. This is particularly reasonable since the U.I.C., as presently constituted provides benefits for abnormal and complicated pregnancy and affords female workers a substantial advantage in the benefits presently paid.

The district court is factually incorrect in asserting that the coverage of normal pregnancy would not destroy the program. Indeed, its order creates a new welfare program for the State of California which is radically different from the U.I.C. Under this program 36% of all benefits will be devoted exclusively to benefits for normal pregnancy, and concentrated in the hands of the approximately 5% of female workers who are pregnant each year.[57] Since normal

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56. *Jefferson v. Hackney, supra.*

57. Approximately 5.3% of female employees covered by the Federal Railway Unemployment Insurance Act have received maternity benefits each year between 1947-52. Women's Bureau, U.S. Dept. of Labor, "Maternity Protection of Employed Women,"

pregnancy constitutes by far the largest single category of disability benefits, it would result in a truely dramatic benefit advantage for female workers. Further, it may be expected that half of these maternity benefits, or 18% of all U.I.C. benefits, would constitute "severance" or "early retirement" pay for workers who end rather than interrupt their employment. In effect, the court below holds that, by establishing a program to minimize the economic impact on workers of disabling illness and injury, the State has obligated itself to something quite different.[58]

However, this Court has correctly held that the superlegislative role assumed by the court below is neither required nor authorized by the Constitution:

> Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure. . . . But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration. . . . But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients. (*Dandridge v. Williams, supra* at 487.)

Bulletin No. 240 at 5 (1952). Approximately the same results were obtained in a 1972 survey of maternity leaves at eight Bell Telephone Companies. Brief of American Telephone and Telegraph Co., amicus curiae.

58. The court below has deprived the State of the opportunity to consider an important question of policy—whether all workers should be required to subsidize childbirth. This issue involves consideration of the proper role of government in supporting or encouraging population growth, which was not involved in the disability insurance program as adopted. *Cf. Dandridge v. Williams*, and concurring opinion of Justice Powell in LaFleur discussed *supra* at 26-27.

CONCLUSION

Appellant submits that when the factors discussed above are weighed together: the legitimacy of the State's objectives in establishing the disability insurance program; the rationality of treating normal pregnancy as different from illness or injury, and the necessity of treating such a high-cost and high-frequency item differently in order to preserve the solvency of the fund, it becomes clear that California has not exceeded its discretion in allocating limited resources in a manner best calculated to alleviate the social ills attendant upon unexpected illness or injury disability. The court below erred in holding the rationally-related classifications created by California to be a denial of equal protection.

The decision of the court below should, therefore, be reversed and remanded, with the direction that appellees' complaint be dismissed.

Dated February 6, 1974.

Respectfully submitted,

EVELLE J. YOUNGER
Attorney General of the State of California

ELIZABETH PALMER
Assistant Attorney General

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Attorneys for Appellant State of California

FILE COPY

In the Supreme Court of the United States

Supreme Court, U.
FILED
FEB 9 1974
MICHAEL RODAK, JR., C

OCTOBER TERM, 1973

No. 73-640

DWIGHT GEDULDIG,

Appellant,

v.

CAROLYN AIELLO, individually and on behalf of all others similarly situated,

Appellees.

DWIGHT GEDULDIG,

Appellant,

v.

AUGUSTINA D. ARMENDARIZ, ELIZABETH B. JOHNSON, JACQUELINE JARAMILLO, individually and on behalf of all other women similarly situated,

Appellees.

CONSOLIDATED CASES ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Appendix to Brief for Appellant

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Assistant Attorney General

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Attorneys for Appellant State of California

Appendix

AFFIDAVIT

State of California
County of Sacramento—ss.

I, D. ALLEN TREAT, M.D., declare that I am the Medical Director for the Employment Development Department (formerly Department of Human Resources Development), State of California. As such, I am responsible for overseeing all medical aspects of the Department's various programs. I have held my current position since May 1, 1970.

After the decision of the United States District Court for the Northern District of California in the case of AIELLO, et al. v. HANSEN (now before the United States Supreme Court as GEDULDIG v. AIELLO, et al.), I began a survey of obstetricians and gynecologists to ascertain their estimates of the duration of possible disability caused by pregnancy. A letter and questionnaire (attached hereto as Exhibit A) were mailed to sixty doctors who are professors of obstetrics and gynecology at California medical schools, obstetricians certified by the American Board of Obstetrics and Gynecology or independent medical examiners on the medical review panel of the Department. Responses were received from 61% of those solicited. Attached hereto as Exhibits B, C, and D, are summaries of the survey results, by category of practitioner, which show a total lack of agreement among experts in the medical teaching field and in medical practice on the expected duration of pregnancy disability. The answers of the medical school professors (assuming sedentary or light occupations) for the pre- and postpartum period of disability ranged from a minimum 2-3 weeks to 15 weeks. The answers of the American Board certified obstetricians ranged from none to 13 weeks. The answers of the independent medical examiners varied from 4 days to 13 weeks.

Several doctors who responded added comments such as "There is a good deal of variation among patients," "would require individual assessment of each case" or "can vary tremendously." Attempts to apply our usual administrative procedures were hampered by the lack of any known clinical consensus on the subject, owing to the tendency of doctors to treat the maternity patient individually. Consequently, we have been unable to establish "normal expectancy" yardsticks of disability duration of the kind we customarily use in connection with illness or injury.

/s/ D. ALLEN TREAT, M.D.
D. Allen Treat, M.D.

Subscribed and sworn to before me this
1st day of February, 1974.

/s/ SYDNEY R. JOHNSON
Notary Public in and for said
County and State

My Commission expires Feb. 27, 1977

EXHIBIT A

DEPARTMENT OF HUMAN RESOURCES
DEVELOPMENT [Letterhead]
800 Capitol Mall
SACRAMENTO 95814

REFER TO:

You may have read newspaper accounts of recent State and Federal Court cases involving pregnancy and our California Disability Insurance program. Although there are still pending some legal points concerning the extent to which the program will be required to pay for pregnancy-related disability, we do need expert advice on the medical aspect of routine maternity care with normal delivery and its possible relationship to "disability". Please give us whatever assistance you can. (If you want your opinion to be treated as confidential, I assure you that your wish will be respected.)

Unlike private medical insurance plans with optional maternity benefits (expensive because of the high risk) our disability insurance is designed to cover the risk of any wage loss resulting from a non-industrial, medically certified "illness" or "injury". To be eligible for benefits from the Disability Fund formed exclusively from employees' money, the insured individual must:

(1) Be unable to perform his regular or customary work,
(2) Be disabled by a medical illness or injury supported by the certificate signed by his treating clinician, and
(3) File a timely claim for these payments to offset his wage loss.

These basic requirements apply without discrimination to all claimants, including pregnant women who may be medically disabled for work. There must be the same documentation of severity, and medical justification for the duration of disability in claims involving pregnancy as in claims for non-pregnancy related conditions. In general, the average maternity case receiving routine prenatal care is considered to be not pathological. Many pregnant women covered by our UI/DI insurance program, and receiving routine maternity care, declare themselves to be "able", and are so certified medically. Such individuals have customarily been paid Unemployment Insurance benefits (not disability).

However, there may be a relatively short period of time preceding, during and following the usual delivery when the gravid patient would not be able to work. The length of time could vary in accordance with the environment or physical demands of different occupations (see enclosed listing).

What is a *reasonable duration* for this period of maternal disability due to only an average pregnancy with normal delivery? We would greatly appreciate your help in formulating future medical guidelines that can be used by our professional staff.

Enclosed with the form to be returned is a self-addressed, stamped envelope for your convenience.

Very truly yours,

D. Allen Treat, M.D.
Medical Director

Encl.

PRELIMINARY SURVEY OF PROFESSIONAL OPINION

Occupation Duration of Maternal Disability [In Days or Weeks]

[See Listing Job Demands]	Pre Partum	Delivery	Post Partum	Total
Sedentary				
Light				
Medium				
Heavy				

Additional Information, Remarks, and Comments:

Name[s] of Contributor[s] Date

Please return this form to:

Medical Director, HRD
800 Capitol Mall
Sacramento, CA 95814

THE PHYSICAL JOB DEMANDS ON WOMEN WORKERS

S Sedentary Work

A *sedentary* job is one involving mostly sitting, plus occasional standing/walking as needed, and the lifting/carrying of objects under 10 pounds.

Example: Assembler [line], bookkeeper, cashier, office worker, telephone worker.

L Light Work

A *light* job requires significant walking/standing, or strenuous use of arms/legs while sitting, plus lifting/carrying 10 pounds frequently or occasional maximum of 20 pounds.

Example: Airplane stewardess, cannery worker, hair dresser, laundry presser, poultry dresser, sales clerk, waitress.

M Medium Work

A *medium* job has physical demands similar to above "light" but with frequent 25 pounds use and maximum of 50 pounds.

Example: Grocerychecker, general duty nurse, LVN, produce packer, restaurant cook or helper.

H Heavy Work

A *heavy* job involves frequent lifting/carrying objects of 50 pounds, and maximum of 100 pounds. Work with weight demands in excess of these limits is "very heavy" job.

Example: Charwoman, farm hand picker, stage grip, welder.

EXHIBIT B

DEPARTMENT OF HUMAN RESOURCES
DEVELOPMENT [Letterhead]
800 Capitol Mall
SACRAMENTO 95814

September 26, 1973

REFER TO:
31:1:em

Robert Creasy, M.D.
Associate Professor
Department of OB/GYN
University of California Hospital
3rd & Parnassus
San Francisco, Ca 94122

Dear Dr. Creasy:

Thank you for your response to our preliminary survey of expert opinion on the question of reasonable duration of inability to work due to usual maternity care with normal delivery. For Sedentary and Light Occupations you estimated that such nonpathological gravid employees would be unable to work for a *total* pre and postpartum period averaging 2-3 weeks.

You may be interested to know how your expert view compares with that expressed by your professional peer group representing other California Medical Schools. For Seden-

tary and Light Occupations the total pre and postpartum period of disability was professionally estimated to be:*

2-3 weeks
4 weeks
3-6 weeks
6 weeks
6-8 weeks
8-9 weeks
10 weeks
15 weeks

We appreciate the help you have given us. If there is anything that we can do for you, please do not hesitate to ask.

Very truly yours,

D. Allen Treat, M.D.
Medical Director

*Note: Each line of the tabulation represents one response.

EXHIBIT C

DEPARTMENT OF HUMAN RESOURCES
DEVELOPMENT [Letterhead]
800 Capitol Mall
SACRAMENTO 95814

December 28, 1973

REFER TO:
31:1:em

Mary Lou Judy, M.D.
1111 University
Menlo Park, Ca 94025

Dear Dr. Judy:

Thank you for your response to our preliminary survey of expert opinion on the question of reasonable duration of inability to work due to usual maternity care with normal delivery. For Sedentary and Light Occupations you estimated that such nonpathological gravid employees would be unable to work for a *total* pre and postpartum period averaging one month.

You may be interested to know how your expert view compares with that expressed by your specialized peer group representing other American Board Certified Obstetricians. For Sedentary and Light Occupations the total pre

and postpartum period of disability was professionally estimated to be:*

None to last trimester (12 weeks)
One month
4-8 weeks
6-8 weeks
6-10 weeks
7-9 weeks
8-10 weeks
9-11 weeks
9-13 weeks
Ten weeks
10-11 weeks
10-12 weeks
Eleven weeks

We appreciate the help you have given us. If there is anything that we can do for you, please do not hesitate to ask.

Very truly yours,

D. Allen Treat, M.D.
Medical Director

*Note: Each line of the tabulation represents one response.

EXHIBIT D

DEPARTMENT OF HUMAN RESOURCES
DEVELOPMENT [Letterhead]
800 Capitol Mall
SACRAMENTO 95814

December 27, 1973

REFER TO:
31:1:em

Stephen L. Saukerson, M.D.
3289 Janes Road
Arcata, Ca 95521

Dear Dr. Saukerson:

Thank you for your response to our preliminary survey of expert opinion on the question of reasonable duration of inability to work due to usual maternity care with normal delivery. For Sedentary and Light Occupations you estimated that such nonpathological gravid employees would be unable to work for a *total* pre and postpartum period averaging 4 days (half a week).

You may be interested to know how your expert view compares with that expressed by your clinical peer group representing other Independent Medical Examiners for State D.I. For Sedentary and Light Occupations the total

pre and postpartum period of disability was professionally estimated to be:*

4 days (half a week)
Three weeks
3-10 weeks
4-11 weeks
4.5 weeks
4.5-6 weeks
six weeks (three such estimates)
8-10 weeks (three such estimates)
8-12 weeks
9-13 weeks

We appreciate the help you have given us. If there is anything that we can do for you, please do not hesitate to ask.

Very truly yours,

D. Allen Treat, M.D.
Medical Director

*Note: Each line of the tabulation represents one response.